82-1849

NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1982

LEONARD B. HEBERT, JR. & CO., INC.;
LANDIS CONSTRUCTION COMPANY, INC.;
PRATT FARNSWORTH, INC.;
BOH BROS. CONSTRUCTION CO., INC.;
AMERICAN GULF ENTERPRISES, INC.;
GURTLER-HEBERT & CO., INC.;
PITTMAN CONSTRUCTION COMPANY, INC.;
BARTLEY INCORPORATED;
BINNINGS CONSTRUCTION CO., INC.;
AND GERVAIS FAVROT COMPANY, INC.,

Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeal's decision in N.L.R.B. v. Leonard B. Herbert, Jr. & Co., Inc., et al., 696 F.2d 1120 (5th Cir. 1983) conflicts with the Ninth Circuit's decision in San Diego Newspaper Guild v. N.L.R.B., 548 F.2d 863 (9th Cir. 1977) and other Circuit Court of Appeals decisions by holding that an employer, which has a bargaining relationship with a union, must provide the union with information on subjects outside central core bargaining issues such as wages, hours, and working conditions, when the union has not first shown the employer that the requested information is relevant to its duties and obligations as the employees' bargaining representative?

2. Whether due process permits a finding of a duty by an employer to provide information, on subjects outside

central core bargaining issues, to a union with which it has a bargaining relationship when the union has failed to demonstrate that the information sought is in any way relevant to the bargaining relationship between the union and the individual employer?

3. Whether the reasons, advanced by the Union for the first time at the hearing before the Administrative Law Judge, for seeking the information from the Companies were sufficient to meet the Union's burden of showing the relevancy of the information it seeks to the bargaining relationship between the Union and the individual Companies?

RULE 28:1 STATEMENT

Parties to this case are:

Carpenters District Council of New Orleans & Vicinity and Local Union 1848	Charging Party
Jerry L. Gardner, Jr. Barker, Boudreaux, Lamy, Gardner & Foley & Foley	Counsel for the Charging Party
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Landis Construction Company, Inc.	
Pratt Farnsworth, Inc.	
Boh Bros. Construction Co., Inc.	
American Gulf Enterprises, Inc.	
Gurtler-Hebert & Co., Inc.	
Pittman Construction Company, Inc.	
Bartley Incorporated	
Binnings Construction Co., Inc.	
Gervais Favrot Company, Inc.	Petitioners

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Associated General Contractors of Louisiana, Inc., New Orleans	Organization Representing the Petitioners

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Leonard B. Hebert, Jr. & Co., Inc, Landis Construction Company, Inc., Pratt Farnsworth, Inc., Boh Bros. Construction Co., Inc., American Gulf Enterprises,

Inc., Gurtler-Hebert & Co., Inc., Pittman Construction Company, Inc., Bartley Incorporated, Binnings Construction Co., Inc., and Gervais Favrot Company, Inc., respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in National Labor Relations Board v. Leonard B. Hebert, Jr. & Co., Inc., et al., 696 F.2d 1120 (5th Cir. 1983), Rehearing and Rehearing En Banc denied ___ F. 2d ___.

OPINIONS BELOW

The decision of National Labor Relations Board Administrative Law Judge is reported at 259 NLRB 881 (1981) and appears as Appendix "C" hereto. The opinion of the National Labor Relations Board is reported at 259 NLRB 881 (1981), and appears as Appendix "D". The opinion of the United States Court of Appeals for

the Fifth Circuit is reported at 696 F.2d 1120 (5th Cir. 1983), and appears as Appendix "A". The Petition for Rehearing and Petition for En Banc Consideration were denied without opinion and appear as Appendix "B".

JURISDICTION

Judgment of the Court of Appeals was entered on January 31, 1983. Timely Petitions for Rehearing and for En Banc Consideration were denied on April 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant statutory provisions are:

1. Sections 8(a)(1), 8(a)(5) and 10(e) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1), 158(a)(5) and 160(e).

Pertinent portions of these statutory provisions are reproduced as Appendix "E".

STATEMENT OF THE CASE

On March 14, 1980, the Carpenters District Council of New Orleans & Vicinity and Local 1846 (the "Union") filed charge number 15-CA-7622 with the Regional Director for the Fifteenth Region of the National Labor Relations Board (the "Board") against eleven construction companies (the "Contractors") and the Associated General Constructors of La., Inc., a trade organization consisting of various construction companies throughout Louisiana, alleging that they had engaged in or were engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1) and (5). The Contractors against whom the charge was filed are Perrilliat-Rickey

Construction Co., Inc.; Leonard B. Hebert Jr. & Co., Inc.; Landis Construction Co., Inc.; Pratt Farnsworth, Inc.; Boh Bros. Construction Co., Inc.; American Gulf Enterprises, Inc.; Gurtler-Hebert & Co., Inc.; Pittman Construction Co., Inc.; Bartley, Inc.; Binnings Construction Co., Inc.; and Gervais F. Favrot Co., Inc. After investigation, a complaint was issued against all of the Contractors except Perrilliat-Rickey Construction Co., Inc., and the Associated General Contractors of Louisiana, Inc. A hearing was held before the Honorable Thomas R. Wilks, Administrative Law Judge, on February 24, 1981, in New Orleans, Louisiana, and all parties were present and were given the opportunity to present evidence and to examine and cross-examine witnesses.

On May 4, 1981, Judge Wilks issued a Decision in which he found that the Contractors had violated Sections 8(a)(1) and (5) of the Act and recommended that they be ordered to furnish the Union with certain information. Thereafter, the Contractors filed exceptions and a supporting brief with the Board.

The Board delegated its authority to a three-member panel which affirmed the rulings, findings, and conclusions of the ALJ and adopted his recommended order, except that contrary to the ALJ, the Board found insufficient evidence to establish the existence of a multiemployer bargaining unit and, in addition, modified the notice by identifying the Union's individual letter requests for information from the Contractors as having been dated between January 18 and February 12, 1980.[1/]

1/ 259 NLRB 881 at 2 nn. 2 & 3.

When the Contractors failed to provide the information as ordered, the Board petitioned the Fifth Circuit Court of Appeals for enforcement. In a decision issued January 31, 1983, a three-judge panel, with Judge Garwood dissenting, enforced the Board's order in all respects. The Contractors filed Petitions for Rehearing and for En Banc Consideration, both of which were denied on April 1, 1983.

The sole basis for the Union's unfair labor practice charge against each Contractor is the Contractor's refusal to provide answers to a series of questions submitted by letter to each Contractor by the Union. The Union's letter asked thirteen questions of each Contractor which ostensibly were asked to find out the relationship between each Contractor and another named company. The letters were identified by the Executive Secretary

of the Union, D. P. Laborde, Sr., and were introduced as joint exhibits.[2/] The following questions were asked in each letter:

1. What positions in [other company] are held by each officer, shareholder, director or other management representative of your Company?

2. State the name of each person who has

2/ The names of the particular Petitioners, the names of the other companies of which the particular questions were asked, and the exhibits numbers follow: American Gulf Enterprises, Inc., and RTL Corporation (J-3(b)); Bartley, Incorporated and Thunderbird Construction Company (J-3(d)); Binnings Construction Co., Inc. and Southbend Contractors Company and Franklin Foundation Co., Inc. (J-3(e) and J-3(f)); Boh Bros. Construction Co., Inc. and Broadmoor Corporation (J-3(g)); Gervais F. Favrot Co., Inc. and Cabildo Construction Company (J-3(j)); Gurtler-Hebert & Co., Inc. and Kendall Construction Co., Inc. (J-3(l)); Leonard B. Hebert Jr. & Co. and Professional Construction Services, Inc. (J-3(o)); Pratt Farnsworth, Inc. and Halmar, Inc. (J-3(r)); Pittman Construction Co., Inc. and Gulf Winds, Inc. (J-3(v)); and Landis Construction Co., Inc. and Audubon Construction Corp. (J-3(w)).

a function related to labor relations of your Company and for [other company].

3. What customers of [other company] are now or were formerly customers of your Company?

4. State the difference, if any, in the type of business engaged in by your Company and [other company].

5. What services, including clerical, administrative, bookkeeping, managerial, engineering, estimating, or other services are performed for [other company] by or at your Company?

6. What supervisory functions are performed by employees of your Company over employees of [other company]?

7. What insurance or other benefits are shared in common by employees of your Company and the employees of [other company]?

8. What skills do the employees of [other company] possess that employees of your Company possess?

9. Please list all former employees of your Company that are now employed by [other company] and their job titles.

10. State whether [other company] is a member of the Associated General Contractors of Louisiana, Inc.

11. Does [other company] have separate contractor license, bank account, books, insurance policies, tax returns than your Company?

12. Was there any leasing of equipment between the two companies during the last year and was it done by written agreement?

13. Was there any interchange of employees in the field during the last year between the two companies?

(The "other company" designated above refers to the other companies mentioned in n. 2.)

In each letter, Laborde asserted that it had come to the Union's attention that the Contractor may have been in violation of the contract between it and the Union and stated the following reason for requesting answers to the questions: "This information is necessary and relevant to the Union's administration of the contract, and in furtherance of its duty of fair representation to all members." After receiving the letters and prior to the filing of the charge underlying this case, a majority of the Contractors wrote Laborde and asked him to detail the reasons why he had requested the information. The Union filed or refused to provide any additional information until the hearing, which was held more than one year after Laborde had requested the information from the Contractors.

At the hearing, Laborde testified that the Union needed the requested information "[f]or the purpose of negotiating and representing the members of [his] Union, because [he] felt that from the information [he] had that these Companies had double-breasted Companies and may be violating [the] agreement [he] had with them...." Tr. 19. Laborde also testified that on January 12, 1979, the Board conducted a representation election at Claiborne Builders. The election was conducted at the premises of Perrilliat-Rickey Construction Company, Inc. Neither Claiborne Builders nor Perrilliat-Rickey were Respondents in the proceedings before the Board or the Fifth Circuit Court of Appeals. According to Laborde, Joe Lemoine, an employee of Perrilliat-Rickey, told him that Perriliat-Rickey had created Claiborne Builders to compete against what

Laborde described as other "double-breasted companies." Tr. 19-22.

Laborde also testified that sometime in 1978 or 1979 he had been told by a Union agent that the agent had observed construction equipment bearing the name of Leonard B. Hebert, Jr. & Co., one of the Petitioners in this case, at the jobsite of a nonunion contractor, Professional Construction Services, Inc. Tr. 34-35.

Finally, Laborde testified that some employees of Petitioner Boh Bros. Construction Co., Inc., had resigned their Union memberships and were working for a nonunion company, Broadmoor Corporation. Tr. 36-37. Broadmoor was not a Respondent in the proceedings before the Board or the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. THE DECISION IMPOSING A DUTY TO DISCLOSE AND FINDING A VIOLATION EX POST FACTO FOR FAILURE TO DO SO IS INCORRECT.

The Decision is in Conflict with the Decisions of Other Courts of Appeal.

An employer's duty to respond to a union request for information concerning matters outside central core bargaining issues such as wages, hours, and working conditions is not triggered until the union first demonstrates to the employer the relevancy of the requested information to a legitimate union concern. San Diego Newspaper Guild v. N.L.R.B., 538 F.2d 863, 867 (9th Cir. 1977). The duty to respond is not triggered when the union merely learns of facts which would give rise to a legitimate concern. Those facts must be communicated to the employer before a duty to respond ever arises. Atlas Metal Parts Co., Inc. v. N.L.R.B., 660 F.2d 304, 310-311 (7th Cir. 1981); Soule Glass &

Glazing Co. v. N.L.R.B., 652 F.2d 1055, 1092-1100 (1st Cir. 1981); N.L.R.B. v. Temple-Eastex, Inc., 579 F.2d 932, 937, n. 1 (5th Cir. 1978); N.L.R.B. v. Western Electric, Inc., 559 F.2d 1131, 1133 (8th Cir. 1977); N.L.R.B. v. Rockwell-Standard Corp., Trans. & Axle Div., 410 F.2d 953, 957 (6th Cir. 1969); Prudential Insurance Co. v. N.L.R.B., 412 F.2d 77, 84 (2nd Cir. 1969), cert. denied, 369 U.S. 928 (1969); United Furniture Workers v. N.L.R.B., 388 F.2d 880, 982 (4th Cir. 1967); Curtiss-Wright Corp. v. N.L.R.B., 347 F.2d 61, 68-69 (3rd Cir. 1965).

It is submitted that the Fifth Circuit gravely erred when, in effect, it ruled that an employer has a duty to respond to a union request for information concerning matters entirely outside the central core bargaining issues when the union simply learns of facts which might make its request legitimate.

It is not disputed that the information requested by the Union in the instant case related to matters outside the Union's central core duties as the employees' collective bargaining representative and, therefore, the requested information was not presumptively relevant. N.L.R.B. v. Leonard B. Hebert, Jr. & Co., Inc., et al., 696 F.2d 1120, 1124 (5th Cir. 1983). Accordingly, the Union had the burden to show affirmatively to each Employer the relevancy of the requested information to a legitimate Union concern affecting such individual Employer before the corresponding Employer's duty to supply information could ever arise in this case. N.L.R.B. v. Temple-Eastex, Inc., 579 F.2d 932, 937 n. 1 (5th Cir. 1978). The question is when must a union make the required showing of relevancy in order to trigger a

duty by an employer to respond to the union's request for information.

In the instant case, the Union mailed letters to each of the ten Petitioner Contractors requesting that they answer certain questions concerning their relationship with ten other separate companies. Apparently in note 3 of the panel majority's decision, the Fifth Circuit ruled that the letters themselves satisfied the Union's burden of establishing the relevancy of the information that the Union sought which in turn triggered the Petitioner's duty to respond. If this is the panel majority's holding, it is clearly contrary to the Ninth Circuit's decisions in N.L.R.B. v. Associated General Contractors of California, Inc., 633 F.2d 766 (9th Cir. 1980), cert. denied 352 U.S. 915 (1981) and San Diego Newspaper Guild v. N.L.R.B., 548 F.2d 863 (9th Cir. 1977) because the

letters indicate only a general "suspicion" of possible contract violations which is legally insufficient to satisfy a union's burden of establishing the relevancy of the information it seeks. The mere suspicion reflected in the Union's letters that the Petitioners may have engaged in double breasted operations does not satisfy nor meet the Union's burden of showing relevancy for as the Fifth Circuit noted "[a] double breasted operation may or may not violate a labor contract." N.L.R.B. v. Leonard B. Hebert, Jr. & Co., Inc., et al., 696 F. 1120, 1122 n.1 (5th Cir. 1983). The Board itself, by inference, has held that letters similar to those sent by the Union in the instant case are not in themselves sufficient to establish the degree of relevancy required to trigger a response from an employer. Doubarn Sheet Metal, Inc., 243 NLRB 821, 824 n. 13 (1979).

In the alternative, even if the panel majority did not rule that the letters alone were sufficient to trigger the Contractors' duty to respond, it is clear that the majority ruled that the Union's reasons for requesting the information, submitted for the first time at the hearing, were adequate to require a response from all ten Contractors. If this ruling is permitted to stand, it will effectively eliminate the legal distinction and corresponding differences between a union's burden when the union requests information concerning central core bargaining subjects and when it requests information concerning noncentral core bargaining subjects.

An example will help illustrate the situation in which an employer (or a union faced with a request from an employer) is placed by the Fifth Circuit's decision:

Step 1: The union mails a request for information to the employer concerning noncentral core bargaining matters, i.e., subjects outside the scope of the traditional wages, hours, and working conditions, without supplying, other than in very general terms, its reasons for requesting the information from the employer;

Step 2: The employer analyzes the union's request and determines that the information is not of the type which is presumptively relevant, i.e., it does not concern wages, hours, or working conditions, and responds to the union's request by asking the union to demonstrate the specific basis for its request, beyond a mere suspicion or surmise, that the collective bargaining agreement has been violated;[3/]

3/ San Diego Newspaper Guild v. N.L.R.B., 548 F.2d 863, 868 (9th Cir. 1977).

Step 3: The union refuses or simply fails to provide the employer with any additional information to establish the relevancy of the information it requests to its duties as the employees' bargaining representative even though at the time it may have had in its possession sufficient information to justify its inquiry;

Step 4: The employer refuses or fails to provide the information requested by the union on the basis that the union has not shown the relevancy of the information beyond a mere "suspicion or surmise" or that the collective bargaining agreement may have been violated;

Step 5: The union files an unfair labor practice charge alleging that the employer has refused to bargain by failing to provide the requested information, and the Board issues a complaint and conducts a hearing to determine if there has been a violation of the Act; and

Step 6: At the hearing, for the first time, the union presents evidence that it did indeed have information to support its contention that the requested information was relevant to its duties as the employees' bargaining representative and that it had this information in its possession at the time that it made its original request for information. On the basis of this belated showing of relevance, the employer is found by the ALJ and the Board to have violated the Act ex post facto even though the employer had not been provided with the facts to support the union's claim of relevancy of the information sought by it at the time the employer was accused of violating the Act.[4/]

4/ These steps are exactly what happened in the instant case. The Union, through Laborde wrote to each Contractor (J-3a, b, d, e, f, g, j, l, o, p, and v). Seven of the Contractors wrote back and asked what

Under this scenario, an employer would be required to provide the requested information at the time of the union's request, despite the fact that the required showing of relevancy had not been made, out of fear that the Union might demonstrate relevancy later at a hearing. By virtue of this decision, the Fifth Circuit has effectively wiped out the second tier of the two-tier test previously approved by the Fifth Circuit

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4/ (Cont'd) information the Union had to support its general and completely unsubstantiated assertion that the collective bargaining agreement was being violated by the Contractors (J-3, c, h, k, m, p, t, and u). Nevertheless, Laborde failed to provide any further information to the Contractors until the hearing, almost one and a half years after the Union had requested the information from the Contractors. It is important to note that both Boh Bros. Construction Co., Inc., and Leonard B. Hebert, Jr. & Co., the two contractors against whom the Union introduced evidence at trial concerning relevancy, were among the Contractors that wrote to the Union to request that it supply information to establish its burden of showing relevancy. The Union failed or refused to respond to these inquiries.

in Temple-Eastex and adopted by every Circuit that has considered the question.[5/] Now any company that refuses to provide information concerning noncore bargaining matters at the time it is requested without specification of relevancy can be subjected to an ex post facto conviction of an unfair labor practice if the information as to relevancy is provided later at the hearing.

5/ Atlas Metal Parts Co., Inc. v. N.L.R.B., 660 F.2d 304, 310-311 (7th Cir. 1981); Soule Glass & Glazing Co. v. N.L.R.B., 652 F.2d 1055, 1092-1100 (1st Cir. 1981); N.L.R.B. v. Temple-Eastex, Inc., 579 F.2d 932, 937, n. 1 (5th Cir. 1978); N.L.R.B. v. Western Electric, Inc., 559 F.2d 1131, 1133 (8th Cir. 1977); San Diego Newspaper Guild v. N.L.R.B., 548 F.2d 863, 867 (9th Cir. 1977); N.L.R.B. v. Rockwell-Standard Corp., Trans. & Axle Div., 410 F.2d 953, 957 (6th Cir. 1969); Prudential Insurance Co. v. N.L.R.B., 412 F.2d 77, 84 (2nd Cir. 1969), cert. denied, 369 U.S. 928 (1969); United Furniture Workers v. N.L.R.B., 388 F.2d 880, 982 (4th Cir. 1967); Curtiss-Wright Corp. v. N.L.R.B., 347 F.2d 61, 68-69 (3rd Cir. 1965).

The Fifth Circuit's decision acts as a trap for the unwary employer or union by creating a meaningless two-tiered analysis which ostensibly requires the requesting party to demonstrate the relevancy of the information it seeks before the other party is compelled to respond to the request. The two-tiered test is "meaningless" because the requesting party is permitted to demonstrate, for the first time at a hearing, long after the initial request for information, that it did indeed have a sound basis for its request for information.

Proper analysis of this problem is hampered somewhat by the familiar role of a hearing as the vehicle for eliciting testimony; after all, this is what hearings are for. However, the Petitioners are criticizing the use of the Union's rationale for seeking the information from the Petitioners, which

was produced for the first time at trial, in the same way that a criminal defendant complains that the police may not produce reasons for seeking a search warrant after the search has been conducted. In both cases the requesting party, be it policeman or union, has a burden to establish the relevancy (or probable cause) of the information it seeks to a possible contract (or criminal) violation. The union must produce its evidence of a violation before the employer should be compelled to answer the union's questions, just as the policeman must produce his evidence to support his belief that he has probable cause that a law has been violated before a magistrate may issue a search warrant. If the requesting party, be it policeman or union, is permitted to establish the basis of its request later, the due process rights of the responding

party, be it employer or citizen, are destroyed.

If the Court were acting as counsel for an employer which had been placed in this position, could it ever advise the employer not to provide the requested information? How would the Court respond to this question from their client -- "What do you mean they can show later on that the union's request is relevant, and I can be convicted? I thought I had due process rights."

II. THE FIFTH CIRCUIT'S FINDING THAT THE UNION HAD A SUFFICIENT BASIS FOR REQUESTING INFORMATION FROM EIGHT OF THE TEN PETITIONER COMPANIES BASED SOLELY ON THEIR ASSOCIATION WITH EACH OTHER IS ERRONEOUS AS A MATTER OF LAW AND FACT.

The Decision is Contrary to Supreme Court Precedent

The Board in its decision specifically found that there was not sufficient evidence to show that the ten Contractors encompassed a multi-employer bargaining

unit.[6/] Despite this finding and no finding to the contrary by the panel, the panel majority ruled that because the Union's witnesses testified at the hearing about possible contract violations involving Boh Bros., Leonard B. Hebert, and "other double-breasted companies that were in the business that had agreements with us," (Tr. 22) there was a basis for enforcing the Board's order against all ten Petitioners. Seizing upon this testimony, the panel majority concluded that the Union had sufficient information to request information from all ten Contractors and to require them to answer the requests for information which were clearly outside the central core of bargaining issues.

The basis of the panel majority's decision is its finding that "it is clear that all of the companies bargained with

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6/ Decision and Order, 2 n. 2.

the Union through the voice of the AGC, and it is reasonable to suppose that the labor policies of the companies are similar." N.L.R.B. v. Leonard B. Hebert, Jr. & Co., Inc., et al., p. 2263 n. 5. This conclusion is simply not supported by any facts. On the contrary, the majority has found the ten Contrators in violation of an Act of Congress based on the fact that these Contractors happen to all be members of the same trade association. Is this what this Court intended when it held that the Board's findings may be sustained only if supported by substantial evidence on the record as a whole?[7/] To state the proposition is to reject it. If this were the law, no company would join a trade association for fear that mere membership would result in a conviction for violating an Act of Congress due to

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7/ Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951).

the conduct of some otherwise unaffiliated member of the assocation.

Even if there were facts to show that the labor policies of the Contractors are the same or similar, there would still be no basis for concluding that the Union had sufficient justification for requesting the information from the eight Contractors of whom it had no specific knowledge of possible collective bargaining violations: Landis Construction Co., Inc.; American Gulf Enterprises, Inc.; Gurtler-Hebert & Co., Inc.; Pittman Construction Company, Inc.; Bartley, Inc.; Binnings Construction Co., Inc.; Gervais Farvot Company, Inc.; and Pratt-Farnsworth, Inc.[8/]

8/ In his dissent, Judge Garwood stated that there was no evidence presented upon which the Union could legitimately request the information from seven of the ten Contractors. It is submitted that there was also no evidence concerning Pratt-Farnsworth other than the fact that the Union had filed a lawsuit against this Contractor. This fact alone would not be the "particular special circumstances"

Absent this totally erroneous conclusion, there is no evidence to support the majority's finding of relevancy of the information requested to the Union's bargaining relationship with eight of the ten Contractors. It is submitted that even if it be found that the Fifth Circuit was correct in its ruling involving Boh Bros. and Leonard B. Hebert, Jr. & Co., Inc., the ruling as it relates to the other eight Contractors should be reversed as it is not supported by any evidence.

III. THE FIFTH CIRCUIT'S FINDING THAT THE REASONS OFFERED AT THE ADMINISTRATIVE HEARING WERE SUFFICIENT TO SATISFY THE UNION'S BURDEN OF SHOWING THE RELEVANCY OF THE INFORMATION IT SEEKS IS INCORRECT.

Even considering the after-the-fact reasons offered by the Union at the

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8/ (Cont'd) which would make the request by the Union relevant and trigger the duty to respond by Pratt-Farnsworth.

hearing, the Union has not shown a relevant need for the information. In fact, the evidence clearly shows that the answers to the questions were sought for a completely irrelevant purpose; therefore, the Contractors were under no obligation under the Act to provide the information even after the Union articulated more detailed reasons for requesting the information at the hearing. "The first question in such a case is always one of relevance. If the information requested has no relevance to any legitimate union collective bargaining need, a refusal to furnish it could not be an unfair labor practice." Emeryville Research Center v. N.L.R.B., 441 F.2d 880, 883 (9th Cir. 1971). "Moreover, the question is not whether requested information is abstractly or theoretically relevant to the performance of a union's statutory duties, but whether it is actually

relevant under the 'circumstances of the particular case.'" I.U.E. v. N.L.R.B., 650 F.2d. 334, 338 (D.C. Cir. 1980) (dissenting opinion), citing N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149 (1956).

There is no better evidence of the irrelevancy of the requested information than the reasons articulated by the Union at the hearing for requesting the information.

Reason 1 -- Administration of the contract. The Union contended that it could not properly administer the contract between it and the various Contractors without the requested information. This certainly was not the true reason, however, as there have been contracts in existence between the Union and the various Contractors since at least 1970, and the Union never requested the information before 1980. The fact that the Union proposed subsidiary clauses,

which would have covered the other companies under the contract by the express terms of the clause, as early as 1971 indicates that the Union knew of the existence of the other companies for at least nine years prior to requesting the information. Why then did all of a sudden the Union need the information in 1980 to "administer the contract" if this was the true reason the information was requested? Why did the Union wait until after it unsuccessfully attempted to organize Claiborne Builders, one of the so-called "double breasted" companies?

Reason 2 -- To further the Union's duty of fair representation to all members. No party attempted to introduce any evidence at the hearing that would show that the Union needed the requested information to further its duty of fair representation to all members. As nothing in the record indicates that the Union

represents any employees for the purposes of collective bargaining who worked for the other companies, the Union obviously did not need the information for this stated purpose, and the Union failed to meet its burden of proving the relevancy of the information under this stated reason.

Reason 3 -- For the purpose of negotiating. The Union alleged that it needed the information in order to bargain effectively with the Contractors. The uncontradicted evidence, however, is that despite ample opportunity to do so, the Union never brought up the subject of needing answers to the questions during the 1980 bargaining session. And, during the same sessions, the Union never made any reference to the fact that it could not bargain effectively without the information. If the Union truly needed the information for bargaining purposes,

why then did the Union make no mention of its request in the 1980 bargaining sessions? "If the Union wanted information it believed relevant to collective bargaining, it was incumbent upon Union's negotiators, as a first step, to request that information from [the Employer] at the bargaining table." I.U.E. v. N.L.R.B., 650 F.2d at 339 (dissenting opinion). The proffered reason of needing the information for bargaining purposes -- to see if the other companies were paying less pay and benefits -- cannot be the true reason as none of the questions sought information relating to the pay and benefits of the other companies.

Laborde also stated that another reason the Union needed the information was to see if any of the Contractors were placing more work in the other companies rather than retaining the work themselves. This cannot be the true reason

either, as the Union did not ask for any information concerning the number of employees, the number of hours worked by those employees, or the volume of business of the other companies. Thus, even if the Contractors had answered the questions to the Union's satisfaction, the Union would still not have information which would assist it in bargaining for the reasons set forth by it at the hearing.

Reason 4 -- To see if any Contractor was acting as a single, integrated employer with any of the other companies. This seems to be the Union's primary stated purpose for requesting the information. However, this reason must also fail because it is clear that the Union already knew that Perrilliat-Rickey and Claiborne Builders were operating as separate employers when it requested the same information from Perrilliat-Rickey concerning its relationship with Claiborne

Builders as it requested from the Petitioners and the other companies. At the time of the request, the Union had a decision from the Acting Regional Director of the Fifteenth Region which stated that Claiborne Builders was a separate employer. Additionally, the Union must have had enough information to conclude that Pratt Farnsworth and Halmar, Inc. were operating as a single integrated employer, as the Union filed a lawsuit in April, 1980, alleging just that. Surely, the Union would not have made such an allegation without having substantial facts to back it up. Since the Union already had this information, the Union had no need for the information requested in the letters to Perrilliat-Rickey and Pratt Farnsworth for the stated purposes for which it was requested. This clearly shows that the Union's stated reason was pretextual.

Furthermore, if in fact the Union wanted to find out if any of the Petitioners and the other companies were operating as single, integrated employers, the Union could have filed a unit clarification (UC) petition with the Regional Director of the Fifteenth Region. Surely, a hearing on a UC petition would have settled the question once and for all and would have provided a proper forum for asking the same questions and obtaining answers that the Union sought. The fact that the Union has not filed such a petition concerning any of the Contractors nor any of the other companies shows that the Union could not have desired the information for the proffered reason.

The fact that the Union was unable to show the relevancy of any of its requests or a relevant reason for making the requests, coupled with the unbelievable testimony that the catalyst for the

Union's sending the letters to the Contractors was a conversation which occurred thirteen months earlier, leads to only one conclusion -- the Union must have had another purpose in mind when requesting the information. The only other possible purpose brought forth at the trial was that purpose mentioned by Union witness Paulino -- "to try to organize all the non-Union Companies that we felt were offsprings from Union Companies." Tr. 65. It is clear that the Union would not openly state that it was seeking the information for organizational purposes, because it knows that it would not be entitled to the information for such purposes. This is why the Union has disguised the request under general terms such as "to police the contract" and "to better represent its members." However, under any type of scrutiny, all of the proffered reasons show marked

inconsistency and unreliability. There are simply too many holes in the Union's articulated reasons to credit any of them and to support a finding of substantial evidence.

If the Union truly believed that the contract was being violated by any Contractor, the Union could have filed a grievance and obtained relevant information from the Contractors concerning the alleged contract violations. But the Union chose not to file a grievance against any of the Contractors.

The failure of the Union's proffered reasons leaves organizational purposes as the only possible reason. However, the Petitioners are under no obligation to assist the Union in organizational activities among their employees much less assisting them in organizing efforts directed against third parties, as is the case here. The Union has not only failed

to meet its burden of showing that it requested the information from any of the Contractors for any legitimate bargaining or representation purpose, but on the contrary, it is obvious the answers to such questions were sought for a completely irrelevant purpose. Therefore, the Petitioners were under no obligation to furnish the information and, therefore, did not violate the Act.

Section 10(e) of the National Labor Relations Act [29 U.S.C. §160(e)] states that "[t]he findings of the Board with respect to questions of fact, if supported by substantial evidence on the record as a whole, shall be conclusive." (Emphasis supplied.) In Universal Camera v. N.L.R.B., 340 U.S. 474 (1951), this Court stated that a reviewing court can set aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial

when viewed in light of the record in its entirety, including the body of evidence opposed to the Board's view. 340 U.S. at 488-90. The Petitioners strongly suggest that a thorough review and analysis of the record in this case will lead the Court to reverse the factual conclusions determined by the ALJ, rubber-stamped by the Board, and approved by the Fifth Circuit and to conclude that there is not substantial evidence on the record to support the Board's findings and order.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted, this 12th day of May, 1983.

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C E R T I F I C A T E

I, Wiliam E. Hester III, certify that three copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served this 12th day of May, 1983, by United States mail, upon:

Mr. Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
Office of the General Counsel
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

and

Mr. Rex E. Lee
Solicitor General of
the United States
U. S. Department of Justice
Washington, D.C. 20530

William E. Hester III

APPENDIX "A"

NATIONAL LABOR RELATIONS
BOARD, Petitioner,

v.

LEONARD B. HEBERT, JR. & CO.,
INC. AND Landis Construction Co.,
Inc., et al., Respondents.

No. 82-4085

United States Court of Appeals,
Fifth Circuit.
Jan. 31, 1983.

After National Labor Relations Board found that construction employers had violated National Labor Relations Act by refusing to furnish information requested by union and ordered its disclosure, Board petitioned court for enforcement of its order. The Court of Appeals, Reavley, Circuit Judge, held that: (1) union met its burden of showing that requested information as to whether construction employers were utilizing double-breasted

operations to evade their contractual obligations to unions was relevant to performance of union's duty; (2) information was not irrelevant on grounds that union already knew that two construction employers were utilizing double-breasted operations and that if union had wanted to find out if any other companies were involved in such operations, union could have filed union clarification petition with Board; and (3) fact that information might be helpful to union in organizational campaign did not render it irrelevant for purposes requested or otherwise excuse employer's nonproduction.

Application for Enforcement of an Order of the National Labor Relations Board.

Before GARZA, REAVLEY and GARWOOD, Circuit Judges.

REAVLEY, Circuit Judge:

This appeal represents the latest round in litigation involving Carpenters District Council of New Orleans and Vicinity Local Union No. 1846 (the "Union") and various employers of union and nonunion construction workers in the New Orleans area. On March 14, 1980, the Union filed formal charges with the National Labor Relations Board ("NLRB" or the "Board") against ten employers (the "employers" or "companies") alleging that the employers had engaged in unfair labor practices within the meaning of §§8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1) and (5) (the "Act"). The basis of the complaint was that the employers had refused, in derogation of collective bargaining agreements existing among the parties, to disclose information that would assist the Union in determining whether the employers

were utilizing "double-breasted"[1/] operations to evade their contractual obligations toward the Union. The NLRB, upholding a decision of an administrative law judge ("ALJ") found that the named employers had violated §§8(a)(1) and (5) of the Act by refusing to furnish the requested information and ordered its disclosure. The Board petitions this court for enforcement of its order and we enforce it in all respects.

1/ We recently explained how a "double-breasted" or "open shop/closed shop" operation works in Florida Marble Polishers Health & Welfare Trust Fund v. Edwin M. Green, Inc., 653 F.2d 972, 976 n. 7 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S. Ct. 2234, 72 L. Ed. 2d 846 (1982). Such an operation is one allowing an employer to compete for both union and nonunion work. For instance, a subcontractor will operate two corporations, one hiring strictly union employees; the other, nonunion employees. The former will bid on jobs from general contractors who utilize ony [sic] unionized subcontractors; the latter bids only on work from general contractors who use nonunion workers. Id. A double-breasted operation may or may not violate a labor contract.

I.

Each of the ten companies involved in this litigation is a member of the Associated General Contractors of Louisiana, Inc., New Orleans District ("AGC-New Orleans" or "AGC"), a trade organization consisting of construction contractors. Although the companies' position as to whether AGC-New Orleans constitutes a multi-employer bargaining unit (a question we need not decide) is unclear from the record,[2/] it

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2/ At oral argument, counsel for the companies vigorously denied that AGC-New Orleans constitutes a multi-employer bargaining unit collectively representing all of the employers. The record reflects that counsel earlier filed written exceptions to the ALJ's decision specifically objecting "[t]o the finding that the [companies] deny the existence of a multi-employer bargaining unit." In any event, AGC's status as an official multi-employer bargaining unit is irrelevant to our present decision because, as explained more thoroughly in text, it is clear that AGC conducted the actual collective bargaining on behalf of the employers with the Union, even though AGC did not itself

appears that AGC has engaged in joint bargaining with the Union on behalf of the companies, which has resulted in the execution of collective bargaining agreements between the Union and the employers. AGC is not a signatory to these agreements, but the individual employers are. Such agreements have been in effect since at least 1961, thus covering the time span of the factual events involved in this case. Collective bargaining agreements in effect from May 1, 1977 through April 30, 1982 contained a "recognition clause" acknowledging the Union as the exclusive representative of each signatory employer's carpenters. The contracts did not contain a "subsidiary clause," however, whereby the agreements

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2/ (Cont'd) become a signatory party to the final agreements. Moreover, AGC is not a defendant in this action and has not itself been ordered to disclose any information.

would have applied to any double-breasted counterparts operated by the employers. The Union had negotiated for such a provision in 1971 and again in 1974 but was unsuccessful in getting the companies to agree to it. The Union did not negotiate for a subsidiary clause thereafter because it lacked sufficient information confirming--and the companies denied maintaining--any double-breasted operations.

Despite the fact that the companies involved here denied double breasting, the Union was presented with evidence from time to time that tended to indicate otherwise. For example, the record reveals that in 1979 the Board held a representation election at Claiborne Builders, a New Orleans construction employer not involved in the instant case. Two Union officials, Davy Laborde, Sr., and James Paulina, Jr., were present to

insure that the election was conducted fairly. Laborde noticed that the election site was also the premises of Perrilliet-Rickey Construction Company ("Perrilliet"), an employer who was then a member of AGC-New Orleans and a party to the collective bargaining agreement with the Union. When Laborde commented on this, the treasurer of Perrilliet, Joe Lemoine, told Laborde and Paulino that Perrilliet had formed Claiborne as a nonunion, double-breasted subsidiary for the purpose of competing against the double-breasted operations of other AGC members who had agreements with the Union. Lemoine then apparently specified several AGC member/employers that utilized double-breasted operations.

The record also reveals that on another occasion, a Union agent observed construction equipment bearing the name of Leonard B. Hebert, Jr. & Co., one of the

employers involved in this case, at the job site of a nonunion contractor, Professional Construction Services. Later, a Hebert superintendent intimated to Laborde the existence of an affiliation between Hebert and Professional.

Finally, record evidence reveals that another New Orleans construction employer, Boh Bros. Company (a respondent in this case) created a nonunion counterpart, Broadmoor Corporation. Boh Bros. was a party to collective bargaining agreements with the Union and was a member of AGC. Employees of Boh Bros. informed Laborde when they relinquished their union membership that they were going to work for Broadmoor Corporation. Thereafter, Laborde actually observed former union members working at a Broadmoor Construction site.

Based on this type of information, the Union sent to each of the ten respondent

companies a letter requesting information concerning possible double breasting. These letters were mailed between January 18 and February 12, 1980.[3/] None of the companies provided the requested information. Interestingly, five of the ten companies responded (each separately) with letters that read identically, word-for-word, asking the Union to disclose "detailed" reasons justifying its request for information.

In the meantime, collective bargaining negotiations between the Union and AGC, on

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3/ Each letter requested answers to 13 questions designed to determine the extent, if any, of the affiliation between the employer/addressee and its alleged double-breasted counterpart which was specificaly named in the letter. For example, the questions inquired as to the existence of common management or ownership between the companies and whether they shared customers or equipment. We believe that the letters set forth sufficient background information about the focus and nature of the Union's inquiry to put the employer/addressee on notice of the basis of the Union's suspicion concerning double breasting.

behalf of the employers, commenced regarding renewal of the agreement that was to expire on April 30, 1980. Laborde testified before the ALJ that Robert Boh, President of both AGC and Boh Bros. Company, commented disparagingly during the course of these negotiations on the Union's letter and subsequent filing of unfair labor practice charges with the Board. Boh denied this during testimony before the ALJ, but the ALJ made a credibility determination that Laborde's version of the events was more believable.

II.

Well-established labor law precedent imposes upon employers a duty "to provide information that is needed by the bargaining representative for the proper performance of its duties." NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36, 87 S. Ct. 565, 568, 17 L. Ed. 2d 495 (1967).

An employer's refusal to furnish information relevant to a union's negotiation or administration of a collective bargaining agreement may constitute a breach of the employer's duty to bargain in good faith in violation of §8(a)(5) of the Act, 29 U.S.C. §158(a)(5). NLRB v. Acme Industrial Co., supra, 385 U.S. at 435-36, 87 S. Ct. at 567-68; Detroit Edison Co. v. NLRB, 440 U.S. 301, 303, 99 S.Ct. 1123, 1125, 59 L. Ed. 2d 333 (1979).

The situation here is virtually indistinguishable from one faced recently by the Ninth Circuit. NLRB v. Associated General Contractors of California, Inc., 633 F.2d 766 (9th Cir. 1980), cert. denied, 452 U.S. 915, 101 S. Ct. 3049, 69 L. Ed. 2d 418 (1981). As Associated General Contractors explains, the key inquiry is whether the information sought by the Union is relevant to its duties.

633 F.2d at 770. The Supreme Court has adopted a liberal, discovery-type standard by which relevancy of requested information is to be judged. Id.; Acme Industrial Co., 385 U.S. at 438 & n. 6, 87 S. Ct. at 568-69 & n. 6. Information intrinsic to the employer-union relationship, such as that pertaining to wages and other financial benefits, is considered presumptively relevant, with the employer having the burden of showing irrelevance. Associated General Contractors, 633 F.2d at 770 n. 4a. Where, however, a union seeks information not ordinarily pertinent to its performance as bargaining representative, but alleged to have become relevant due to particular circumstances, no presumption exists and the union has the initial burden of establishing relevancy before the employer must comply. San Diego Newspaper Guild v. NLRB, 548 F.2d 863, 867 (9th Cir. 1977).

Information of the type sought by the Union in this case does not appear to be presumptively relevant, see Associated General Contractors, 633 F.2d at 770, and thus the Union here has the initial burden of showing relevancy.

We hold that the Union has met that burden. As recounted earlier, the Union had numerous indications (before it made its request) that several member/employers of AGC-New Orleans had created double-breasted operations to evade contractual obligations toward the Union. Some of these indications were indirect, such as the statement to Laborde from a third party (Lemoine) that many employers were utilizing double-breasted operations. Other indications were direct, such as Laborde's observation of formerly union employees working at a Broadmoor Corporation construction site after these employees had told Laborde they were

relinquishing their union membership in order to go to work for the double-breasted counterpart of Boh Bros. This evidence acquired by the Union before it requested the information, and testified to at the hearing before the ALJ, formed a reasonable basis for further investigation of the suspected double breasting. This is to say that the type of information sought by the Union would assist it in confirming its suspicions and thereby allow it to make an informed choice[4/] whether to pursue legal means by which it could hold the nonunion companies to the terms of the collective bargaining agreements involved here. For

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4/ See Acme Industrial Co., 385 U.S. at 438 n. 8, 87 S. Ct. at 569 n. 8, quoting Fafnir Bearing Co. v. NLRB, 362 F.2d 716, 721 (2d Cir. 1966) ("By preventing the Union from conducting these studies [for an intelligent appraisal of its right to grieve], the Company was, in essence, requiring it to play a game of blind man's bluff") (bracketed changes appearing in Supreme Court opinion).

as we recently had occasion to explain in depth, in an appeal involving some of the same parties now before us, two separate methods exist by which a nonunion employer may be held to the terms of a collective bargaining agreement executed by its alleged union counterpart: the single employer doctrine and the alter ego doctrine. Carpenters Local Union 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 504-09 (5th Cir. 1982). Our opinion in Pratt-Farnsworth answers the contention by the employers that the sought-after information is irrelevant to the administration and enforcement of existing collective bargaining agreements, to the Union's duty of fair representation for its members, or to its ability to bargain effectively with the companies concerning future contracts.

The employers also argue that the information is irrelevant because the

Union already knew that two construction employers in the New Orleans area, Perrilliet-Rickey and Pratt-Farnsworth, utilized double-breasted operations.[5/] Moreover, the

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5/ The employers raise the related argument that just because the Union had evidence of double breasting with regard to some of the companies, such as Boh Bros., Pratt-Farnsworth, and the Hebert Co., the Union should not be allowed to use this evidence as support for a request for information about the other companies. Indeed, the hearing before the ALJ reveals that the Union did not put on evidence of possible double breasting with regard to some of the ten respondent companies, at least specifically by name. This fact does not provide a valid defense to nondisclosure for those companies, however, for two reasons. First, the Laborde-Lemoine conversation gave the Union reason to believe there was double breasting by most, if not all, of the member contractors of AGC-New Orleans. Second, although it is unclear whether AGC-New Orleans constitutes a multi-employer bargaining unit here, it is clear that all of the companies bargain with the Union through the voice of AGC, and it is reasonable to suppose that the labor policies of the companies would be similar. Furthermore, as we emphasize repeatedly in the text, allowing the Union access to the information does not prove or conclude anything on the merits about

employers contend that if the Union wanted to find out if any of the other companies were involved in double breasting, it could have filed a unit clarification petition with the NLRB. We reject these arguments for several reasons.

First, they misread the standard by which the relevancy of the information is to be judged. As noted earlier, a disclosure request is examined under a liberal, discovery-type standard. The Union need only be "acting upon the probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. This discovery-type standard decide[s] nothing about the merits of the union's

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5/ (Cont'd) the existence of double breasting; the information is, however, discoverable under the liberal, discovery-type standard set out in Acme Industrial Co.

contractual claims." Acme Industrial Co., 385 U.S. at 437, 87 S. Ct. at 568 (footnote omitted). "It is sufficient that the information sought is relevant to possible violations where the union has established a reasonable basis to suspect such violations have occurred. Actual violations need not be established in order to show relevancy." Associated General Contractors, 633 F.2d at 771.

Second, whatever information the Union possessed with regard to Perrilliet-Rickey and Pratt-Farnsworth could not answer the Union's suspicions about the other companies involved here. Perrilliet-Rickey is not even a respondent in this case.[6/]

6/ Perrilliet-Rickey is not involved in the present litigation and yet one of the primary reasons the Union suspected double breasting with regard to the companies here is because of the conversation between Laborde and Lemoine recounted earlier in the text.

Third, the Union need not take the formal action of filing a unit clarification petition with the Board before it can discover the information. Again, the liberal discovery-type standard refutes such an argument. See Acme Industrial Co., 385 U.S. at 437-38, 87 S. Ct. at 568-69. Moreover, if the Union were later to file charges for breach of a collective bargaining agreement against one of the employers under an alter ego theory, as opposed to the single employer doctrine, the Board would probably have no occasion to reach the question of the appropriateness of the representational unit. Pratt-Farnsworth, Inc., 690 F.2d at 508-09.

The employers raise one final defense to disclosure of the information. They argue that the only possible reasons that the Union desired the information was for organizational purposes, i.e., for the

purpose of "unionizing" the double-breasted counterpart companies. The fact that the information might be helpful to the Union is an organizational compaign does not render it irrelevant, for the purposes requested or otherwise excuse its nonproduction, however. Associated General Constractors, 633 F.2d at 772, accord Utica Observer-Dispatch v. NLRB, 229 F.2d 575, 577 (2d Cir. 1956).

In conclusion, we agree with the Board that the Union's request was one for relevant information, that the employers have not shown any persuasive reasons for nondisclosure, and that their failure to disclose constitutes an unfair labor practice under §§8(a)(1) and (5) of the National Labor Relations Act. Accordingly, it is ordered that the Board's order be in all respects

ENFORCED.

GARWOOD, Circuit Judge, dissenting:

I respectfully dissent. As to seven of the ten respondents (e.g., all respondents other than Hebert, Farnsworth and Boh), it is plain to me that the complainant Carpenters Union wholly failed to discharge its admitted burden of "showing . . . relevance and need" and "failed to show that the information was actually relevant to the situation as it then existed," as its evidence amounted to no "more than mere 'suspicion or surmise.'" San Diego Newspaper Guild Local No. 95 v. N.L.R.B., 548 F.2d 863, 868 (9th Cir. 1977). See also N.L.R.B. v. Temple-Eastex, Inc., 579 F.2d 932, 937 n. 1 (5th Cir. 1978).

With respect to these seven respondents, the Union relied primarily on the testimony of its business agent Laborde as to what Lemoine, an officer of Perrilliet, a contractor not a respondent

herein, had told Laborde in a conversation occurring more than a year before the Union sent the letters in question. According to Laborde, Lemoine said Perrilliet had formed a nonunion "double-breasted" company in order to "compete against" "the other contractors who had agreements with us" that had done so, "and he named a bunch of them that had the double-breasted companies." There is no indication that any of these respondents were among the companies named by Lemoine. As it was the Union's burden to show its entitlement to the information requested of these respondents, and as what Lemoine said was peculiarly within the knowledge of the Union officer and witness Laborde, the only fair assumption is that Lemoine did not include any of these respondents among the "bunch of" double-breasted contractors he identified. If this indicates anything, it is that these

respondents were not engaged in the practice the Union sought to investigate.

The other "evidence" relied on by the Union respecting these seven respondents is that they, in common with the other respondents, were members of the New Orleans AGC, and that there were indications several AGC members, not including any of these seven respondents, had "double-breasted" companies. There is not a shred of evidence, however, that the practices of AGC members in respect to a matter such as this were normally uniform. Indeed, there is no evidence whatever as to the degree of uniformity or diversity of practice in this or any similar regard among AGC members. The majority's statement (note 5) that "it is reasonable to suppose that the labor policies of the companies would be similar" (emphasis added) is without any support in the record, and is the kind of guilt-by-

association approach which our courts have so long and so vigorously eschewed. If this is not "mere 'suspicion or surmise,'" then what do these words mean?

Reliance in this respect on N.L.R.B. v. Associated General Contractors, 633 F.2d 766 (9th Cir. 1980), cert. denied, 452 U.S. 915, 101 S. Ct. 3049, 69 L. Ed. 2d 418 (1981), is wholly misplaced. In the AGC case, there was a multi-employer bargaining unit, and the AGC was the party with which the Union contracted. Evidence indicating that some of the AGC members, who were covered by this contract, engaged in "double breasting" was held to justify the Union's request for information from the AGC. In other words, there was evidence of "double breasting" for which the party from whom the information was sought was contractually responsible to the Union requesting the information. Here, by contrast, the Board, in the order

which the majority enforces, has found "insufficient evidence to establish the existence of a multiemployer bargaining unit." Moreover, none of the requests for information herein issued were made to the New Orleans AGC, and it is not even a respondent. Rather, the requests were made severally to the individual respondent companies, and they individually and severally are respondents in this unfair labor practice proceeding. So far as this record shows, we have treated General Motors and Chrysler just like Chevrolet and Pontiac.

There are other glaring deficiencies in the proof. Not only is there no evidence of any "double breasting" by these seven respondents, there is indeed no evidence whatever of any relation between them and their respective assumed siblings concerning whom the Union made inquiry. Nor is there any showing that

the assumed siblings employ any carpenters or are even in the construction business.

The majority purports to recognize the settled distinction between information normally intrinsic to the employer-employee relationship, which is considered presumptively relevant, with the employer having the burden to show otherwise, and information, such as that here sought, which is not ordinarily pertinent to the Union's relationship with the employer from whom it is requested, but may be relevant due to the existence of particular special circumstances, as to which the Union has the initial burden of showing relevancy. However, if this distinction has any validity and subserves any purpose, then in the second class of case some character of showing, beyond "mere 'suspicion and surmise,'" must be required of the Union in regard to the particular employer from whom the

information is sought and who is made respondent in the unfair labor practice proceeding. Since no such showing has been made as to these seven respondents, I respectfully dissent.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4085

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

LEONARD B. HEBERT, JR. & CO., INC. AND LANDIS CONSTRUCTION COMPANY, INC., ET AL.

Respondents.

Application for Enforcement of an Order of the National Labor Relations Board

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ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 1/31/83, 5 Cir., 198__, ____ F.2d ____).

(April 1, 1983)

Before GARZA, REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

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United States Circuit Judge

APPENDIX "C"

JD-217-81
New Orleans, La.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LEONARD B. HERBERT JR. & CO., INC.: LANDIS CONSTRUCTION COMPANY, INC.: PRATT FARNSWORTH, INC.: BOH BROS. CONSTRUCTION CO., INC.: AMERICAN GULF ENTERPRISES, INC.: GUTLER HERBERT & CO., INC.: PITTMAN CONSTRUCTION COMPANY, INC.: BARTLEY, INCORPORATED: BINNINGS CONSTRUCTION CO., INC.: GERVAIS F. FAVROT COMPANY, INC.

and Case No. 15-CA-7622

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS & VINCINITY AND LOCAL UNION 1846

Charlotte N. White, for the General Counsel.
Jerry L. Gardner, Jr., Barker, Boudreaux, Larry Gardner & Foley, of New Orleans for the Charging Party.
William E. Hester, III and Frederick A. Kullman, Kullman, Lang, Inman & Bee, of New Orleans for the Respondents.

DECISION

Statement of the Case

THOMAS R. WILKS, Administrative Law Judge: This case was heard on February 24, 1981 at New Orleans, Louisiana, pursuant to a complaint issued by the Regional Director of Region 15 on August 6, 1980 which alleged that the above captioned Employers, herein referred to individually and collectively as Respondents violated Section 8(a)(5) and (1) of the Act by refusing to bargain good in faith with the above captioned labor organization, herein referred to as the Union, in that they refused to furnish the Union with certain information. The Respondents filed an answer denying the commission of any unfair labor practices.

Upon the entire record, my observation of witnesses, and consideration of the post-hearing briefs, I made the following:

Findings of Fact

I. Business of the Respondents

With the exception of Pittman Construction Company, Inc., which is a Delaware corporation, the following named Respondents are Louisiana corporations which, in addition to Pittman Construction Company, Inc., maintain offices and facilities in the New Orleans, Louisiana, metropolitan area where they engaged in the building and construction business:

Leonard B. Herbert, Jr. & Co., Inc.
Landis Construction Company- Inc.
Pratt Farnsworth, Inc.
Boh Bros. Construction Co., Inc
American Gulf Enterprises, Inc.
Gutler-Herbert & Co., Inc.
Bartley, Incorporated
Binnings Construction Co., Inc.
Gervais F. Favrot Company, Inc.

During the 12 months preceding the issuance of the complaint, a period representative of all times material herein, the foregoing named Respondents,

each individually, in the course and conduct of their business purchased and received goods and materials valued in excess of $50,000, which goods and materials were shipped directly to their respective operations located in the metropolitan area of New Orleans, Louisiana, from points located outside the State of Louisiana.

It is admitted and I find that the Respondents are, individually and collectively, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Unfair Labor Practices

The complaint alleges that since at least May 1, 1977, and at all times thereafter, and continuing to date, the Union has been, and is now, the representative for the purposes of collective

bargaining of a majority of the employees in an appropriate unit and by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all employees in said unit for the purposes of collective-bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment; and that the unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act is as follows:

All carpenters employed by Respondents, individually and collectively, on their construction projects located within the geographical jurisdiction of the Union, excluding all other employees.

The Respondent admitted the foregoing allegations but amended its answer at the hearing to admit that the Union is the designated bargaining agent for employees in individual bargaining units but that

the Respondent denies the existence of a multi-employer bargaining unit.

The record reveals that the Respondents and the Union have since at least 1961, maintained a collective bargaining relationship and have entered into successive collective bargaining agreements which embody rates of pay, wages, hours of employment and other terms and conditions of employment. The last two contracts in that series of contracts were in effect during the periods of May 1, 1977 to April 30, 1980, and May 1, 1980, to April 30, 1982, and reveal that the Respondents are signatory thereto and parties thereby as members of the New Orleans District, Associated General Contractors of Louisiana, Inc. (herein called AGC). Those contracts further indicate that the AGC "and such other Employers for whom the [AGC] has bargained" are parties thereto and

referred to therein as "contractors" or "Employers." The Recognition clause therein states:

> The Contractors, during the life of this agreement, recognize the Unions as the exclusive bargaining representatives for all of their employees coming under the respective jurisdiction of the Unions for the prupose [sic] of collective bargaining in respect to rates of pay fringes, hours of employment and other conditions of employment.

There is uncontradicted record testimony to the effect that a committee of the AGC engaged in joint bargaining with the Union on behalf of the Respondents. Accordingly I conclude that the General Counsel has sustained its burden of proof with respect to the aforesaid allegations concerning the individual and collective nature of the bargaining unit. In any event, it is clear that the Respondents had an obligation to bargain with the Union concerning wages, hours and conditions of

employment of carpenters located within the geographical jurisdiction of the Union, whether individually or collectively.

Davy P. Laborde Sr., the business representative of the Union, testified that he has participated in negotiations with the Respondents since 1961. In response to cross examination Laborde testified that for several years he had received reports from agents of the Union and other persons engaged in the construction business to the effect that some of the Respondents had formed "double-breasted" companies to perform unit work with non-union employees. Laborde testified in further cross examination that on one occasion he had made a fruitless investigation of citings of certain machinery owned by a respondent at a job site of a construction company whose employees were unrepresented by the

Union and where unit work was performed. Employees of one of the Respondents had also informed Laborde on another occasion that they requested the withdrawal of their union cards upon commencement of employment at a reputed "double-breasted" company.

In past negotiations with Respondents on at least two occasions Laborde proposed the incorporation into the collective bargaining agreement of a so-called "subsidiary clause," for the purpose of automatically extending the coverage of the collective bargaining agreement to additional enterprises formed by the respondents. These attempts failed. Laborde testified, without contradiction, that he ceased such efforts in that the Respondents had continually refused to answer his inquiries as to other related companies and adamantly insisted that they maintained no double-breasted operations.

On December 15, 1978, pursuant to a representation petition filed by the Union, and a hearing conducted on November 27, 1978, the Acting Regional Director of Region 15, in Case No. 15-RC-6380, directed an election in a carpenters' unit at Claiborne Builders, Inc., in or near New Orleans, Louisiana. An election was conducted on January 12, 1979. Laborde testified that he engaged in a conversation on the day of that election at the Claiborne place of business with Joe Lemoine who identified himself as the Treasurer of Claiborne as well as the Treasurer of Perrilliet-Rickey Construction Company, Inc., which Laborde discovered then to have occupied a common premises with Claiborne.[1/] Laborde

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1/ Perrilliet-Rickey Construction Company, Inc., was a member of the AGC and a party to the contract which expired on April 30, 1980. It was named in the instant unfair labor practice charge as

testified without contradiction and with substantial corroboration by Union agent James Paulino, Jr. who was present, that Lemoine explained to him that Perrilliet-Rickey had formed a secondary company i.e. Claiborne, for the purpose of competing against other "double-breasted" companies that were formed by other parties to the collective-bargaining agreement i.e. the Respondents. Although Laborde had initially fixed the date of this conversation in November, 1979, he retracted his testimony to place it in January, the date of the election, having explained his confusion as to the month of the hearing and month of the election. Despite his initial confusion I credit his uncontradicted testimony as to the substance of

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1/ (Cont'd) was the AGC, but, like the AGC, not named in the Complaint. The General Counsel stated in its brief that Perrilliet-Rickey timely withdrew from the AGC and accordingly was not named in the Complaint.

the conversation and that it occurred on the date of the election at Claiborne.

Paulino in his uncontradicted testimony added that during this conversation when Lemoine asked why the Union was seeking an election at Claiborne, he, Paulino, responded: ". . . that we were going to try to organize all the non-union companies that we felt were offsprings from union companies."

Laborde testified that thereafter he determined that it was necessary to obtain information from the Respondents concerning the existence of any "double-breasted" enterprises in order to discover whether the Respondents had violated the collective-bargaining agreement by failing to extend the terms and conditions of the collective-bargaining agreement to the employees of such "double-breasted" companies. Additionally he determined that such

information would assist him in contract negotiations with the Respondents with regard to two area e.g. whether he would revive his request for the subsidiary clause, and what positions the Union should take with respect to economic issues. With respect to possible economic positions he explained that such could have been affected by knowledge of what the Respondents were affording non-union employees of affiliated companies. That is to say for example he might modify his economic demands if a risk existed of losing unit work to the non-union affiliated companies.

Between January 18, 1980, and February 12, 1980, prior to the April 30, 1980, expiration date of the collective-bargaining agreement, the Union by individual letters, requested of the Respondents answers to 13 questions, which the Union it its letter explained were

necessary because of information it had obtained to the effect that the individual respondent had by the operation of a specifically named enterprises performed work which otherwise would have been performed by the Respondents and by such conduct Respondents might be in violatoin of the collective-bargaining agreement provisions i.e. "wages, scope of agreement, referral clause, fringe benefit provisions and recognition and possibly other articles." The questions are set forth as follows with the exception that the name of each alleged double-breasted company is replaced herein by the designation "other company."

1. What positions in [other Company] are held by each officer, shareholder, director or other management representative of your company?

2. State the name of each person who has a function related to labor relations for your Company and for [other Company]?

3. What customers of [other Company] are now or were formerly customers for your Company?

4. State the difference, if any, in the type of business engaged in by your Company and [other Company].

5. What services, including clerical, administrative, bookkeeping, managerial, engineering, estimating, or other services are performed for [other Company] by or at your Company?

6. What supervisory functions are performed by employees of your Company over employees of [other Company]?

7. What insurance or other benefits are shared in common by employees of your Company and the employees of [other Company]?

8. What skills do the employees of [other Company] possess that employees of your Company possess?

9. Please list all former employees of your Company that are now employed by [other Company] and their titles.

10. State whether [other Company] is a member of the Associated General Contractors of Louisiana, Inc.

11. Does [other Company] have separate contractor license, bank account, books, insurance policies, tax returns than your Company?

12. Was there any leasing of equipment between the two companies during the last year and was it done by written agreement?

13. Was there any interchange of employees in the field during the last year between the two companies?

The Respondents all declined to provide the requested information. Thereafter negotiations for the most

recent collective-bargaining agreement transpired and resulted in a new agreement prior to expiration date of the old contract. The instant unfair labor practice charge had been filed on March 14, 1980.

I credit Laborde's more certain testimony that during the recent contract negotiations Robert Boh, president of the Respondent of Boh Bros. Construction Co., President of the AGC, and chairman of the contractors negotiation committee, referred disparagingly to the aforedescribed information request letters and to the instant unfair labor practice charge. However, Boh testified without contradiction that the Union sought no contractural modification concerning alleged "double-breasted" companies, nor did it state that it could not bargain effectively without the aforesaid requested information. Moreover, Laborde

conceded that he said nothing more concerning the requested information other than ". . . Well you received my letter, but thats it, I'm waiting for an answer." I credit his testimony.

Laborde testified that although the collective-bargaining agreement provides for a grievance procedure, the Union chose rather to file the instant unfair labor practice charge in order to obtain the information necessary to support a grievance. Some testimony was adduced by the Respondent in cross examination for Laborde to the effect that in June 1980 the Union filed a certain lawsuit against one of the Respondents, Pratt Farnsworth Inc., and an alleged double-breasted company, wherein the Union alleged that the two companies constituted a single integrated Employer. Laborde explained that at the time of the lawsuit he did have some information as to that

individual respondent to support the suit, but that "as we go along we pick up information," and that he is continually "picking up information." Laborde testified that he consulted with an attorney as to the most efficacious manner in which to proceed.

Conclusion

The General Counsel contends that the Respondents violated Section 8(a)(5) and (1) of the Act by refusing to provide to the Union requested information concerning alleged "double-breasted" operations to which the Union was entitled in order to properly represent bargaining unit employees.

The Respondents take the position that the Union has failed to demonstrate a relevant need for the information requested, and that the actual purpose for which the information was sought,

organizing, is irrelevant thereby excusing the Respondents of any obligation to provide same.

The Respondents argue that the information is not necessary for the administration of the contract because, despite a long history of contractual relations, such information was never previously requested. It argues that the information was not necessary to further the Union's duty of fair representation because the Union failed to prove that it needed the information for fair representation of employees and that there is no actual evidence adduced herein that the Union represents any employees of the alleged double-breasted companies.

With respect to negotiations, the Respondents assert that in view of the Union's lack of persistence for the information during the bargaining process, it truly did not need that information;

and that in any event it did not ask for other information that would have been necessary to support its economic position in bargaining.

The Respondents conclude, correctly, that the primary purpose advanced by the Union for the information was to discover whether any of the Respondents were acting as a single integrated employers with any other companies. Respondents dismiss this objective because it concludes that the Union "already knew" that non-respondent Perrilliet-Rickey and Claiborne were operating as separate employers having had "an official decision" of the Acting Regional Director in the representation case, and because the Union filed the lawsuit in June 1980 against another individual Respondent. Respondents argue that the Union could have filed a unit clarification petition with the Regional Director to obtain the same information if

it indeed really desired the information for the stated purpose. Respondents further argue that if the Union believed that the contract was violated it could have filed a grievance. The Respondents conclude that the ture reason for the Union's information request was a desire to engage in organizational activity, and that Respondents are under no obligation to assist such effort. Finally Respondents contend that certain questions are unrelated to any proffered reason i.e. identity of customers and membership in the AGC.

An employer is obliged by the Act to bargain in good faith with the employe's designated bargaining agent and a failure to furnish to the Union requested information which is relevant to the negotiation of and administration of a collective-bargaining agreement may constitue a breach of that obligation.

Detroit Edison Co. v. N.L.R.B., 440 U.S. 301, 303 (1979); N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 435-36 (1967); N.L.R.B. v. Truitt Manufacturing Company, 351 U.S. 149, 152 (1956). Information concerning terms and conditions of employment within the bargaining unit is presumptively relevant and no specific showing of relevance is required, but as to areas outside the unit a more restrictive standard of relevance is applied. Ohio Power Co., 216 NLRB 987, 991 (1975).

In Associated General Contractors of California 242 NLRB No. 124 (1979) enf'd 633 F.2d 766 (9th Cir. 1980) the Board considered the issue of whether a union was entitled to receive from a multi-employer bargaining association a list of "open shop" members. Prior to the information request, the Union therein had become aware of the employer association's

activities in encouraging and aiding the expansion of open shop and "double-breasted" ventures by its employer members and prospective members. The Board observed that with respect to a "double-breasted" operation, i.e. a contractor who operates a union company and a non-union company, may depending upon the factual configuration effectuate a single appropriate bargaining unit, or separate units. The Board noted that where a single unit has been effectuated, the collective bargaining unit may be held to over the non-union employees as well, or the employer may be obliged to bargain on behalf of both enterprises with the collective bargaining agent of the unionized entity.[2/] Accordingly, the

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2/ At page 5 slip. op., fn 5, citing therein: R. L. Sweet Lumber Company, 207 NLRB 529 (1973), enf'd. 515 F.2d 785 (C.A. 10, 1979) cert denied 423 U.S. 986

Board concluded that the Union's principal purpose in seeking the data was to "facilitate inquiry" into whether or not some of the employer association's open shop members were bound by the collective-bargaining agreements and included in the represented units. The Board stated:

> They [unions] are entitled to the requested information under the 'discovery-type' standard enumerated in N.L.R.B. v. Acme Industrial Co. [supra], to juduge for themselves whether to press their claims in the contractual grievance procedure, or before the Board or courts, or through remedial provisions in the contracts under negotiation. The Torrington Company v. N.L.R.B., 545 F.2d 840 (2d Cir. 1976). It is certainly well within the statutory responsibilities of the unions to scrutinize closely all facets relating to the diversion or preservation of bargaining unit work and, therefore, they are fully warranted in any reasonsable probing of data concerning the exclusion of the employees of certain AGCC members from the bargaining units. [citing N.L.R.B. v. Rockwell-Standard Corporation, Transmission and Axle Division, Forge Division, 410 F.2d 953, 957 (6th Cir. 1969); Curtiss-

Wright Corporation v. N.L.R.B. 347 F.2d 61 (3rd Cir. 1965).] 3/

The Board also held that even if the information was also sought by the Union for organizing purposes, it was nontheless [sic] entitled to the information sought inasmuch as a request for information made for a proper and legitimate prupose [sic] is not vitiated by the co-existence of other purposes, or that other uses can be made of such information.4/

In Doubarn Sheet Metal, Inc., 243 NLRB No. 104 (1979), the Board considered issues similar, if not identical, to those raised in this case. Therein the labor organization had received "information"

3/ The Board noted however that assuming arguendo that the information sought was not otherwise "presumptively relevant" under the discovery standard of the Acme Industrial Co., Case, that the relevance was established on the record before it. supra, slip. op. pp. 9-10.

4/ Citing, Utica Observer-Dispatch, Inc. v. N.L.R.B., 229 F.2d 575 (2nd Cir. 1956), supra slip. op. p. 11.

that a certain etnerprise was performing with non-unit employees work which was of a type normally performed, and which previously had been performed by the employer with with unit employees. The Union thereafter by letter requested of the employer answers to seven questions concerning the business relationship of the employer with the other enterprise. Six of those questions are virtually the same as 6 of the 13 questions posed by the Union to the Respondents herein. The employer there, as in this case, contended that the information requested was irrelevant. The Board found that the data sought provided information as to whether a single employer situation existed or whether the employer had assigned or contracted work to the other enterprise and therefore served the purpose of assisting the Union by supporting its contention that the employer as a single

employer with the other company was not meeting contractual obligations e.g wage scale and union security or as a separate employer had violated contractual provisions concerning subcontracting or the industry protection clause of the collective bargaining agreement. The Board held that the Union had demonstrated the "reasonable and probable relevance" of such information in regard to its contentions of contract violations, and rejected the employer's argument that the Union was obliged to demonstrate actual instances of contractual violations as a condition precedent to the employer's obligation to provide the information. The Board also rejected the argument that the Union's contentions as to contract violations constituted "mere speculation or suspicion." The Board noted that the bona fides of the Union's receipt of

"information" was unchallenged.[5/]

The Board's decision in the Doubarn and AGC of California cases are dispositive of the issues in this case. The Union herein obtained "information" to the effect that Respondents were forming double-breasted operations. It is not necessary that this "information" be shown to be accurate, non-hearsay, or otherwise admissable in a court of law, or even ultimately reliable. However, coming from several sources, including an employer party to the contract and at that time member of the AGC, I conclude that the information was such as to warrant the inference that the Union, in consequence, entertained bona fide questions concerning the existence

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5/ The parties therein had stipulated that the Union had "received information" as set forth above. The stipulation did not specify the precise nature of that information, and the Board appears not to have considered the nature or source of the information.

and nature of related operations of the Respondents. I conclude that the answers to these questions necessitated information that was of reasonable or probable relevance to the Union's effective performance as administrator and negotiator of the collective bargaining agreement. Furthermore as the Board observed, in the AGC of California case, the data which was sought, was sought for the primary purpose of ascertaining whether or not other specifically identified operations were so related to the Respondents operations by a variety of factors such as to encompass the other employees within the unit. If in fact those employees were within the same unit, information as to them would be presumptively valid. Accordingly I conclude that information necessary to resolve a bona fide question as to whether

the collective bargaining unit has expanded is presumptively relevant.

Respondents' arguments that the Union's sole purpose in seeking the information was for organizational purposes are unconvincing. The Union may very well have desired to organize these other operations, but such organizing effort would be unnecessary if the Union could ascertain that these other operations constituted mere extensions of the collective bargaining units which it represents.

Furthermore there is no basis upon which to infer that the Union already possessed conclusive information that these other operations constituted separate and distinct employing entities with separate bargaining units, as suggested by the Respondent. The answer to Respondents' questions as to why the Union did not press for the so-called

"subsidiary clause" in negotiations, and why it did not adduce evidence herein that it represented employees in the other companies is self evident i.e. it did not have sufficient information to support its position ergo its request for same Respondent asks if the Union needed the information to bargain effectively why did it not insist on the requested information in the 1980 negotiations. The answer is that the Union had already made a formal written request and had filed an unfair labor practice charge upon the Respondents' refusal to supply the information. That the Union proceeded with negotiations without the information does not indicate that the information was irrelevant to its secondary purpose nor that it would not have assisted the Union in bargaining. The Union never contended that the information was essential for bargaining nor that it was the sine qua

non for bargaining, but only claimed that it would have assisted it in bargaining. Respondents' contention that the requested information was too incomplete to assist the Union in bargaining again does not render it unrelated to that purpose. Perhaps the Union could have asked for more complete information, but what it did ask for was not unrelated to the secondary purposes as stated by union agent Laborde. In any event the information was clearly related to the primary purpose stated by the Union.

Respondent argues that the stated primary purpose of the requested data i.e. the ascertainment of whether Respondents were acting as single integrated employers with other companies must be rejected as not being the true purpose. The respondent claims that the acting Regional Director had made a finding in a representation case that Perrilliet-Rickey

and Claiborne were separate employers and therefore the Union was already aware of that status when it requested the same information from Perrilliet-Rickey. However Perrilliet-Rickey is not a respondent herein. In any event Laborde's credible testimony reveals that his conversation with Lemoine occurred after the acting Regional Director's decision and thus he did not have sufficient information to sustain a contrary position in the representation case.

Respondent suggests that the Union must have had sufficient information regarding Pratt Fransworth in that the Union had filed a law suit in which it contended that a single integrated enterprise existed. However, the nature of the law suit, the issues involved, and the decision therein is unknown. Whatever information the Union may have had regarding Pratt Farnsworth for purposes of

that lawsuit, it is not shown that such information was identical to that requested in this proceeding. With respect to Respondent's suggestions that the Union could have proceeded with a unit clarification petition with the Board, or could have filed a grievance, such action would have been fruitless without information to sustain such action. As the Board has noted a union is entitled to seek information under discovery type standards by which it can judge for itself whether to press its claim before the Board, the Courts, or in a grievance procedure.

Finally, contrary to the Respondent, I conclude that all of the questions posed by the Union to the Respondents are manifestly related to the primary purposes for which it was sought, in view of the totality of factors the Board considers in deciding whether or not an "arms length

relationship" exists between unitegrated [sic] companies. Don Burgess Construction Co., supra.; see also, Erlich's, Inc., 231 NLRB 1237, 1242-44 (1977) Great Chinese American Sewing Co., 227 NLRB 1670, 1678 (1977); Altemose Construction Company, 210 NLRB 138 (1974).

Accordingly I conclude that the Union by its letters of January 18 and February 12, 1980, addressed to the Respondents requested information that was relevant and necessary to the performance of its obligations as bargaining agent for Respondents' employees i.e. the administration and negotiation of collectivebargaining agreements with the Respondents. I therefore find that the Respondents by failing and refusing to provide the information requested by the Union, violated and is violating Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. Respondents are, individually and collectively, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is, a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to provide the Union with the information it requested in its letters to the Respondent, of January 18, and February 12, 1980, the Respondents have each engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that by the aforementioned conduct that the Respondents have violated Section 8(a)(5) and (1) of the Act, I recommend that they be ordered to cease and desist from engaging in such conduct in the future and take certain affirmative action designed to effectuate the policies of the Act.

Accordingly, I recommend that the Respondents be ordered to furnish the Union with the requested information found above to be relevant and necessary in contract administration and contract negotiation as set forth in the Union's letters to the Respondents of January 18 and February 12, 1980.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of

the Act, I hereby issue the following recommended:[6/]

Order

Respondents Leonard B. Herbert Jr. & Co., Inc.: Landis Construction Company, Inc.: Pratt Farnsworth, Inc.: Boh Bros. Construction Co., Inc.: American Gulf Enterprises, Inc.: Gutler-Herbert & Co., Inc.: Pittman Construction Company, Inc.: Bartley, Incorporated: Binnings Construction Co., Inc.: Gervais F. Favrot Company, Inc., their officers, agents, successors, and assigns shall:

6/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regionations of the National Labor Relations Board the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Refusing to bargain collectively with Carpenters District Council of New Orleans & Vicinity and Local Union 1846, by refusing to furnish it with the information requested by it in its letters to Respondents of January 18 and February 12, 1980.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Upon request bargain collectively with the above named union by furnishing it with the information requested by its letters of January 18 and February 12, 1980.

(b) Post at their places of business in the New Orleans, Louisiana, places of business copies of the attached notice marked "Appendix."[7/] Copies of said notice, on forms provided by the Regional Director Region 15, after being duly signed by the Respondents' representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

7/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read, "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C. May 4, 1981

Thomas R. Wilks
Administrative Law Judge

APPENDIX "D"

JD-217-81

FJZ

259 NLRB No. 126

D--8249

New Orleans, LA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEONARD B. HEBERT, JR., & CO., INC.; 1/ LANDIS CONSTRUCTION, INC.; COMPANY INC.; PRATT FARNSWORTH,; BOH BROS. CONSTRUCTION CO., INC.; AMERICAN GULF ENTERPRISES, INC.; GUTLER-HERBERT & CO., INC.; PITTMAN CONSTRUCTION COMPANY, INC.; BARTLEY, INCORPORATED; BINNINGS CONSTRUCTION CO., INC.; GERVAIS FAVROT COMPANY, INC.

and Case 15--CA--7622

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS & VICINITY AND LOCAL UNION 1846

1/ We hereby correct the Administrative Law Judge's inadvertent misspelling of the name of Respondent, Leonard B. Hebert, Jr., & Co., Inc., in his Decision. 259 NLRB No. 126.

DECISION AND ORDER

On May 4, 1981, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, counsel for the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the Record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2/] and

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2/ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the

conclusions of the Administrative Law Judge and to adopt his recommended Order.[3/]

The Administrative Law Judge found, and we agree, that Respondents violated Section 8(a)(5) and (1) of the Act by refusing to provide the information requested by the Union concerning their alleged "double-breasted" nonunion companies. In doing so, he stated that the Union never contended that the

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2/ (Cont'd) clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Contrary to the Administrative Law Judge, we find insufficient evidence to establish the existence of a multiemployer bargaining unit.

3/ The notice is modified by identifying the Union's individual letter requests for information from Respondents as having been dated "between January 18 and February 12, 1980."

information sought was essential for bargaining. Regardless of whether the Union did or did not so contend, it is clear from the record that the Union needed and sought the said information to police the existing agreement and to prepare for bargaining negotiations. We further find that the Union bargained as best it could in light of Respondent's prior refusal to furnish the information and its disparaging remarks during negotiations concerning the Union's requests, and that during negotiations the Union informed Respondent's negotiating committee chairman that it for an answer" to its request for said information.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the

Administrative Law Judge and hereby orders that the Respondent, Leonard B. Hebert, Jr., & Co., Inc.; Landis Construction Company, Inc.; Pratt Farnsworth, Inc.; Boh Bros. Construction Co., Inc.; American Gulf Enterprises, Inc.; Gutler-Herbert & Co., Inc.; Pittman Construction Company, Inc.; Bartley, Incorporated; Binnings Construction Co., Inc.; and Gervais Favrot Company, Inc., New Orleans, Louisiana, their officers, agents, successors, and assigns, shall take the actions set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. ____ December 30, 1981

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Carpenters District Council of New Orleans & Vicinity and Local Union 1846, by failing and refusing to furnish the said labor organization with the information requested in the Union's letters to us of January 18, or February 19, 1980.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, furnish Carpenters District Council of New Orleans & Vicinity and Local Union 1846 with the information requested in the Union's

letter to us at various dates between January 18 and February 12, 1980.

LEONARD B. HEBERT, JR. & CO., INC.; LANDIS CONSTRUCTION COMPANY, INC.; PRATT FARNSWORTH, INC.; BOH BROS. CONSTRUCTION CO., INC.; AMERICAN GULF ENTERPRISES, INC.; GUTLER-HERBERT & CO., INC.; PITTMAN CONSTRUCTION COMPANY, INC.; BARTLEY INCORPORATED; BINNINGS CONSTRUCTION CO., INC.; GERVAIS FAVROT COMPANY, INC.

(Employer)

Dated _____ By _____
(Rep.) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Plaza Tower, Room 2700, 1001 Howard Avenue, New Orleans, Louisiana 70113, Telephone 504--589--6389.

APPENDIX "E"

THE NATIONAL LABOR RELATIONS ACT STATES IN PERTINENT PART:

29 USC §158

(a) It shall be unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 USC §160

(e) The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.